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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1977

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No. 77-1126

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FRANK D. STANLEY and the O/S NATIONAL,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondents.*

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**PETITIONERS' REPLY MEMORANDUM**

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I.

The Solicitor General argues that the search of the O/S National was based on probable cause. Brief in Opposition at 6-9. This assertion is made notwithstanding the court of appeals' affirmance of the district court's finding that the customs agents and Coast Guard officers did not have probable cause to search the vessel. See Petition at 6a.

The concurrent finding of two courts may not be thus attacked. The government may not, without having filed

a cross-petition or a cautionary cross-petition, attack the judgment of the court of appeals in an effort to convince this Court that the petition should be denied. *Strunk v. United States*, 412 U.S. 434, 437 (1973); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). See generally Stern & Gressman, *Supreme Court Practice*, 310-312 (4th ed. 1969).<sup>1</sup>

Even if the government could argue that its challenge of the finding of the court of appeals is in some way supportive of that judgment, the government has not met the heavy burden imposed by the "two-court rule" of showing a "very obvious and exceptional" error. *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 421 U.S. at 401, n.2. The district court and the court of appeals each found that there was absolutely no connection between the O/S National and the pier where the marijuana debris was found. Such factual findings have traditionally been left undisturbed. The continued vitality of this principle is evidenced by this Court's deference to a similar factual finding in its most recent exposition of the fourth amendment. *United States v. Ceccolini*, 46 U.S.L.W. 4229, 4231 (March 21, 1978).

## II.

The government's brief in opposition does not touch the central question advanced in support of granting

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<sup>1</sup> Cf., Stern, *When to Cross-appeal or Cross-petition - Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974). Mr. Stern argues that the unanimous opinion in *Strunk* imposes too heavy a burden on the Solicitor General to decide when a cross-petition or a cautionary cross-petition is necessary.

certiorari: namely, that this case presents important fourth amendment and statutory questions. The border search exception has drifted from our shores and the need for some guidance by this Court is clear.

Respectfully submitted,

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